

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 11 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DONALD J. BEARDSLEE

Plaintiff and Appellant,

vs.

JEANNE WOODFORD, Director and
JILL BROWN, Warden

Defendants and Appellees.

Case No. 05-15042

**MOTION OF AMERICAN CIVIL
LIBERTIES UNION OF
NORTHERN CALIFORNIA AND
DEATH PENALTY FOCUS TO
FILE AMICUS BRIEF IN
SUPPORT OF APPELLANT**

Alan L. Schlosser, SBN 49957
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
1663 Mission Street, Ste. 460
San Francisco, CA 94103
Tel: (415) 621-2493
Fax: (415) 255-8437
Attorney for Amici Curiae

Stephen F. Rhode, SBN 51446
Rhode & Victoroff
1880 Century Park East, Suite 411
Los Angeles, CA 90067
Tel: (310) 277-1482
Fax: (310) 277-1485
Of Counsel for Death Penalty Focus

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DONALD J. BEARDSLEE

Plaintiff and Appellant,

vs.

JEANNE WOODFORD, Director and
JILL BROWN, Warden

Defendants and Appellees.

Case No. 05-15042

**MOTION OF AMERICAN CIVIL
LIBERTIES UNION OF
NORTHERN CALIFORNIA AND
DEATH PENALTY FOCUS TO
FILE AMICUS BRIEF IN
SUPPORT OF APPELLANT**

Alan L. Schlosser, SBN 49957
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
1663 Mission Street, Ste. 460
San Francisco, CA 94103
Tel: (415) 621-2493
Fax: (415) 255-8437
Attorney for Amici Curiae

Stephen F. Rhode, SBN 51446
Rhode & Victoroff
1880 Century Park East, Suite 411
Los Angeles, CA 90067
Tel: (310) 277-1482
Fax: (310) 277-1485
Of Counsel for Death Penalty Focus

MOTION TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT

The American Civil Liberties Union of Northern California and Death Penalty Focus hereby move, pursuant to Fed. R. App. 29(a)(b), for leave to file the accompanying amicus brief in support of Plaintiff-Appellant.

Amici are public interest organizations holding a principled belief that capital punishment is unconstitutional. Because the institution of capital punishment currently enjoys legal sanction, we are committed to ensuring that if a state does choose to perform executions, it does so as humanely as possible.

In furtherance of that interest, amici are active participants in the public debate on capital punishment in general and on the humaneness of executions in particular. We therefore require *accurate* information on these subjects. The most telling information on the humaneness of particular execution methods is evidence of whether or not executed inmates actually experience pain. If executed inmates do experience pain, indicia of the quantity of pain experienced are central to the public debate and are of great public concern.

As members of the public, amici are holders and beneficiaries of the First Amendment right, set out in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 886 (9th Cir. 2002) ("*CFAC*"), to witness executions. We appear in this case because we value and intend to exercise fully our right to know whether California's lethal injection procedure subjects inmates to significant pain prior to death. The decision in this case will impact our ability to do so effectively.

Amici believe that filing the accompanying amicus brief would be helpful to the Court for three reasons. First, neither of the parties in this case is properly situated to vigorously assert the constitutional right discussed in the brief, the First Amendment right of access to important public proceedings. That right is held by the press and the public and is meant, in the execution context, to serve those wishing to gather information on the execution process in order to scrutinize government conduct and contribute to the important public discourse on capital punishment. *CFAC*, 299 F.3d at 876. Amici have an institutional history of scrutinizing the government's application of the death penalty.

Second, the right of access raised by amici is an important one. The First Amendment right of access to important public proceedings is a “*structural*” right that is critical to the proper functioning of our democracy because it ensures that the important public debate on how government operates is an informed one. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring) (emphasis in original).

Third, amici are particularly knowledgeable of the issue. The ACLU Foundation of Northern California was counsel in the *CFAC* case, which presented almost identical legal issues to those raised here with regard to the First Amendment right of access to executions.

For these reasons, amici respectfully request that their amicus brief be filed and considered by this Court.

DATED: January 11, 2005

Respectfully Submitted,



ALAN L. SCHLOSSER, ESQ.

Attorney for Amici Curiae:

American Civil Liberties Union of

Northern California

Death Penalty Focus

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 1663 Mission Street, Suite 460, San Francisco, California 94103. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On January 11, 2005, I served the foregoing document:

**MOTION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN
CALIFORNIA AND DEATH PENALTY FOCUS TO FILE
AMICUS BRIEF IN SUPPORT OF APPELLANT**

on the parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope, addressed as follows:

Dane R. Gillette
Senior Assistant Attorney General
Office of the Attorney General
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102-7004
Tel: (415) 703-5866
Fax: (415) 703-1234

Steven S. Lubliner
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
Tel: (707) 789-0517
Fax: (707) 789-0515

I am readily familiar with the business' practice of collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

Executed on January 11, 2005, at San Francisco, California.

Cynthia D. Williams